85-1278

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIAZAR HERRERA-VINEGAS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether The Decision Of The United States Court Of Appeals For The Fifth Circuit Affirming The District Court's Abuse Of The Writ Dismissal Of 28 U.S.C. § 2255 Motion, Deprived Petitioner Of A Proper Review Of His Right To A Fair Trial And His Sixth Amendment Rights, Due To The Absence Of A Language Interpreter During The Trial Of The Petitioner, A Spanish Speaking Individual Who Does Not Understand English, Thereby Denying The Petitioner His Constitutional Right To Understand The Proceedings Against Him In Order To Be Able To Assist Counsel In His Own Defense, Confront And Cross-Examine Witnesses With Knowledge Of The Testimony Of The Witnesses, And To Be Present At His Own Trial.

2.

The Decision Of The United States Court Of Appeals For The Fifth Circuit Affirming The Summary Denial Of The Petition For Writ Of Habeas Corpus Was Erroneous As It Was Based On The Improper Application Of The Doctrine Of Abuse Of The Writ And An Inaccurate Interpretation Of Petitioner's Affidavit.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
1.	
THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING THE DISTRICT COURT'S ABUSE OF THE WRIT DISMISSAL OF 28 U.S.C. § 2255 MOTION, DEPRIVED PETITIONER OF A PROPER REVIEW OF HIS RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHTS, DUE TO THE ABSENCE OF A LANGUAGE INTERPRETER DURING THE TRIAL OF THE PETITIONER, A SPANISH SPEAKING INDIVIDUAL WHO DOES NOT UNDERSTAND ENGLISH, THEREBY DENYING THE PETITIONER HIS CONSTITUTIONAL RIGHT TO UNDERSTAND THE PROCEEDINGS AGAINST HIM IN ORDER TO BE ABLE TO ASSIST COUNSEL IN HIS OWN DEFENSE, CONFRONT AND CROSS-EXAMINE WITNESSES WITH KNOWLEDGE OF THE TESTIMONY OF THE WITNESSES, AND TO BE PRESENT AT HIS OWN TRIAL .	4

2.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING THE SUMMARY DENIAL OF THE PETITION FOR WRIT OF HABEAS CORPUS WAS ERRONEOUS AS IT WAS BASED ON THE IMPROPER APPLICATION OF THE DOCTRINE OF ABUSE OF THE WRIT AND AN INACCURATE INTERPRETATION OF PETITIONER'S AFFIDAVIT .. 8

CONCLUSION 11

APPENDIX—Opinion of the United States Court of Appeals for the Fifth Circuit, dated November 25, 1985 ..... App. 1

TABLE OF AUTHORITIES

Cases PAGE

Arizona v. Natividad, 111 Ariz. 191, 526 P. 2d 730 (1974) 6

Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966) 7

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973) 6

Haley v. Estelle, 632 F. 2d 1273 (5th Cir. 1980) .. 9

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 7

McShane v. Estelle, 683 F. 2d 867 (5th Cir. 1982) . 9

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965) 6

Price v. Johnson, 334 U.S. 266, 68 S.Ct. 1049 (1948) 9

Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068 (1963) 8, 9

Constitutional Provisions and Statutes

Sixth Amendment, United States Constitution 2, 7

28 U.S.C. Section 1827 2

28 U.S.C. Section 2255 ..... 2, 3, 4

Federal Rules of Civil Procedure, Rules 9(b) and 56(c) 2, 3, 8, 9, 10, 11

In The

Supreme Court of the United States

October Term, 1985

ELIAZAR HERRERA-VINEGAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRAYER

The Petitioner, Eliazar Herrera-Vinegas, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 25, 1985.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, which will not be published under Local Rule 47.5, appears in the Appendix attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals of the Fifth Circuit was entered on November 25, 1985. This petition is filed within 60 days of that date, and jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution is involved here and provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

The statutory provisions involved are 28 U.S.C. Section 2255, 28 U.S.C. Section 1827, and Federal Rules of Civil Procedure 9(b) and 56(c).

STATEMENT OF THE CASE

Petitioner, Eliazar Herrera-Vinegas, was indicted in June of 1977 in the United States District Court for the Western District of Texas for narcotics possession and distribution. Petitioner was found guilty and sentenced to a term of 45 years imprisonment, a 45 year special parole term, and a $100,000 fine.

The Petitioner speaks Spanish as his native tongue, and did not speak English at the time of his trial. There was no language interpreter present during the trial. Petitioner's privately retained counsel informed the trial court just prior to sentencing that he was not certain of the Petitioner's ability to understand the language and that he had difficulty communicating with the Petitioner.

Petitioner, through his trial counsel, appealed his conviction to the Fifth Circuit Court of Appeals, raising issues with regard to the sufficiency of the evidence but silent as to the interpreter issue. The Fifth Circuit Court of Appeals affirmed the conviction in an unpublished opinion.

Petitioner filed a pro se motion pursuant to 28 U.S.C. § 2255 in 1980. The District Court denied the petition without a hearing. Petitioner filed a second pro se motion pursuant to 28 U.S.C. § 2255 in August of 1983, raising as an issue for the first time failure of the Court and counsel to provide an interpreter. The District Court summarily denied the second pro se petition, invoking Rule 9(b), noting that although new issues were raised in the second petition, there had been no showing by the Petitioner as to why those grounds could not have been raised in his first petition.

Petitioner appealed, pro se, the dismissal of his second petition to the Fifth Circuit Court of Appeals, which reversed the district court, holding that the Petitioner should have been afforded an opportunity to explain his failure to raise all of his claims in his first § 2255 petition.

On remand, Petitioner filed an affidavit setting forth his response to the Rule 9(b) issue. The magistrate, without conducting a hearing, recommended that the petition be summarily dismissed. The district court, without de novo review, adopted the magistrate's recommendation.

The Fifth Circuit Court of Appeals affirmed the district court ruling, holding that the Petitioner failed to meet his burden in rebutting the charge of abuse of the writ, which the Petitioner seeks to challenge.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING THE DISTRICT COURT'S ABUSE OF THE WRIT DISMISSAL OF 28 U.S.C. § 2255 MOTION, DEPRIVED PETITIONER OF A PROPER REVIEW OF HIS RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHTS, DUE TO THE ABSENCE OF A LANGUAGE INTERPRETER DURING THE TRIAL OF THE PETITIONER, A SPANISH SPEAKING INDIVIDUAL WHO DOES NOT UNDERSTAND ENGLISH, THEREBY DENYING THE PETITIONER HIS CONSTITUTIONAL RIGHT TO UNDERSTAND THE PROCEEDINGS AGAINST HIM IN ORDER TO BE ABLE TO ASSIST COUNSEL IN HIS OWN DEFENSE, CONFRONT AND CROSS-EXAMINE WITNESSES WITH KNOWLEDGE OF THE TESTIMONY OF THE WITNESSES, AND TO BE PRESENT AT HIS OWN TRIAL.

The defendant did not understand English and his entire trial was conducted without the assistance of a courtroom interpreter. The defendant was unable to understand the proceedings against him.

The defendant's inability to comprehend the proceedings against him deprived him of his right to assist in his own defense and to confront the witnesses against him with knowledge of the testimony the witnesses had presented at trial.

The defendant was physically present in the courtroom. However, while the defendant was able to observe the trial, it was incomprehensible to him. In the instant case, the right of confrontation and the right to be present at the trial, in the defendant's view, were denied, not because the right to meet the witnesses face to face was denied but by reason of the fact that the defendant was unable to understand the testimony of the witnesses against him.

The trial court recognized the defendant's need for an interpreter at the sentencing stage and appointed a courtroom interpreter. Defense counsel candidly informed the trial court that the absence of a courtroom interpreter was due to his tardiness and that he was not aware that he was required to provide a courtroom interpreter. Trial counsel informed the trial court for the first time about the defendant's inability to comprehend English and communicate with counsel at the sentencing hearing.

The defendant contends that his retained counsel's silence about defendant's need for an interpreter before and during trial was not an effective waiver of his right to understand the proceedings against him. There is nothing in the record that indicates that defense counsel's failure to request or provide an interpreter for the defendant was part of any trial strategy. Conversely, it appears affirmatively in the record that counsel was not aware of the appropriate procedures for the use of a courtroom interpreter.

The defendant contends that his silence on the interpreter issue was not an intentional relinquishment or abandonment of a known right. The defendant had no knowledge of the existence of his right to an interpreter at trial until long after the conclusion of his trial. In defendant's view, his passive acquiescence to the absence

of a courtroom interpreter was due to his lack of knowledge of his right to a courtroom interpreter at his trial and his inability to comprehend the proceedings against him.

The defendant's position is that the proceedings against him were incomprehensible to him and that he was, therefore, incapable of knowingly or intelligently waiving a right he did not comprehend.

The constitutional guarantee of due process in a criminal trial is, in essence, the right to a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed. 2d 297 (1973). That guarantee encompasses both the right of a defendant to confront witnesses against him and his right to assist in his own defense. See U.S. Constitution, amendment VI; *Chambers v. Mississippi*, 410 U.S. at 295, 93 S.Ct. at 1046, *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965).

The decision in the case of *Arizona v. Natividad*, 111 Ariz. 191, 526 P. 2d 730 (1974) (en banc) at page 733, contains an excellent discussion of the issue raised by Petitioner, involving a man on trial who does not understand English, as follows:

> A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against and insensible object, possibly infringing upon the accused's basic right to be present in the courtroom at every stage of his trial. 568 F. 2d at 1132, 526 P. 2d at 733.

The Petitioner was denied his Sixth Amendment Constitutional rights and his right to a fair trial.

There was no waiver of the right to an interpreter in the instant case. The Petitioner had no knowledge of his right to an interpreter at trial or on the direct appeal prepared by trial counsel. The Petitioner raised this right at the first opportunity, upon discovery of the existence of his right to an interpreter. A finding of waiver is warranted only where the record clearly establishes that there was an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966).

Similarly, the inartful drafting of an affidavit, without the benefit of counsel's assistance or a working knowledge of the English language, should not be allowed to deny Petitioner of a full and meaningful review of the denial of his Constitutional rights.

The writ abuse question should not be a bar to the issue raised by the Petitioner, on procedural or substantive grounds. However, assuming arguendo, that the writ abuse question was to be resolved against Petitioner, it is so central to the administration of justice, and his trial so far departs from the accepted course of judicial proceedings, that this Honorable Court may still choose to exercise its inherent supervisory powers to correct the obvious injustice done to the Petitioner.

2.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING THE SUMMARY DENIAL OF THE PETITION FOR WRIT OF HABEAS CORPUS WAS ERRONEOUS AS IT WAS BASED ON THE IMPROPER APPLICATION OF THE DOCTRINE OF ABUSE OF THE WRIT AND AN INACCURATE INTERPRETATION OF PETITIONER'S AFFIDAVIT.

The Petitioner, serving a 45 year prison term, sought relief by filing a pro se writ of habeas corpus in 1979, raising issues as to the evidentiary rulings, double jeopardy, sufficiency of the evidence, and ineffective assistance of counsel. Relief was denied by the district court. Petitioner filed a second pro se petition for writ of habeas corpus in 1983, raising, for the first time, the failure to provide an interpreter at trial issue. This second petition was denied without a hearing, the court declaring that this second petition was abusive of the writ, applying Rule 9 (b). To date the Petitioner has not had a hearing on a petition for writ of habeas corpus.

The Petitioner asserts that the restrictive guidelines applicable to dismissal of a motion under Rule 9 (b) are inapplicable in the instant case, and that the motions were filed pro se is a relevant factor for the court's consideration.

A district court can avoid full consideration of the merits of a claim raised for the first time in a successive habeas petition only if there has been an abuse of the writ. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068 (1963).

Rule 9 (b) is a codification of the seminal case of *Sanders v. United States*, with its guidelines concerning abuse of the writ. Rule 9 (b) did not in any way change the standards that govern habeas corpus petitions in the federal courts; rather, it restates principles that had been previ-

ously judicially developed. Rule 9 (b) is not intended to automatically foreclose each petitioner who fails to claim every ground for relief in his first application in federal court.

Under the abuse of writ doctrine, in order to dismiss a petition without reaching the merits of new grounds raised in a successive petition, it must be shown that the petitioner either deliberately withheld a claim from a previous petition or was inexcusably neglectful. It is clear that a petitioner cannot be charged with having abused the writ if, at the time of his earlier petition, he was unaware of the facts on which his newly asserted claims are based, or was unaware that those facts constituted a basis for which federal habeas corpus relief could be granted. *Haley v. Estelle*, 632 F. 2d 1273 (5th Cir. 1980); *McShane v. Estelle*, 683 F. 2d 867 (5th Cir. 1982).

In determining whether the failure to allege a claim in an earlier petition is excusable, this court has also taken special care in reviewing habeas corpus petitions filed pro se. *Price v. Johnson*, 334 U.S. 266, 68 S.Ct. 1049 (1948). A pro se petitioner should not be penalized because his inexperience in jurisprudence left him unaware of claims he had not considered at the time of his first application for habeas corpus. *McShane v. Estelle*, 683 F. 2d at 870. As this court pointed out in *Sanders*, an applicant for habeas relief ought not to be held to the niceties of a lawyer's pleadings or be cursorily dismissed because his claim seems unlikely to prove meritorious. *Sanders v. United States*, 83 S.Ct. at 1080.

The Petitioner, in his affidavit, stated that he did not intentionally withhold any claims. That averment is uncontradicted. Thus, the issue is then whether, as a matter of law, the record reflects that the Petitioner, acting pro se, was inexcusably neglectful in failing to allege in his second pro se motion.

The record before the district court, considered by the Court of Appeals for the Fifth Circuit, reflects that the Petitioner has proceeded pro se throughout his first and second motions. Moreover, he responded pro se to the magistrate's rule to show cause why his second pro se petition should not be summarily dismissed pursuant to Rule 9 (b), obviously an important pleading. Furthermore, the problems inherent in proceeding pro se on his first and second motions were compounded by the fact that he did not speak or understand the English language. It is difficult to imagine the serious problems that would confront a layman trying to prepare a critical legal pleading in a foreign language. It is respectfully submitted that the Petitioner's response to the magistrate's rule to show cause graphically demonstrates that he did not abuse the writ and that there is no evidence of any purpose to vex, harass or delay in this pro se petition. In his pro se response, the Petitioner explained:

> The defendant has tried on previous occasions to bring these specific issues before the court. The defendant has been assisted by jailhouse attorneys that has hindered his case because of their lack of knowledge, inexperience and communication problems they had with the issues the defendant tried to communicate to them.

This response clearly established, as a matter of law, that he did not abuse the writ. The Petitioner, who is not a lawyer and does not speak or understand English, tried to communicate the claims he thought he had to fellow inmates, or was told of claims by fellow inmates. They in turn, with their limited abilities, knowledge and inexperience, were unable to understand or comprehend the legal significance of his claims and they did not include those claims in the first motion. Surely these claims, including the right to an interpreter, should not be dismissed because abuse of the writ.

The decision of the Court of Appeals for the Fifth Circuit as to writ abuse is predicated upon an interpretation of an affidavit filed pro se in response to the Rule 9 (b) issue. The Petitioner never acknowledged, contrary to the Fifth Circuit Court of Appeals, knowledge in 1979, or prior to the first time he raised the issue as to the right to an interpreter. The obvious explanation for his failure to raise the issue was his lack of knowledge of the existence of the right. Petitioner had no knowledge of the legal significance of the underlying facts of this case until he first learned of his right to an interpreter at trial.

The facts and circumstances of this case are naturally complicated by the Petitioner's lack of working knowledge of the English language. This deficiency cannot properly support the inaccurate interpretation of the affidavit offered by the Court of Appeals for the Fifth Circuit. The Petitioner's basic argument was, and is, that he raised the issue of his right to an interpreter when he first learned of its existence and when he received assistance to put it into the English language.

CONCLUSION

For these reasons, Petitioner, Eliazar Herrera-Vinegas, respectfully prays this Honorable Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1225
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELIAZAR HERRERA-VINEGAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(November 25, 1985)

Before POLITZ, GARWOOD, and JOLLY, *Circuit Judges.*

PER CURIAM:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Eliazar Herrera-Vinegas appeals the district court's abuse of the writ dismissal of his 28 U.S.C. § 2255 motion. Rule 9 (b) of the Rules Governing § 2255 Proceedings.[1]

Herrera was convicted in 1977 of conspiracy and of violating various narcotics laws. His conviction was affirmed. 573 F. 2d 1308 (5th Cir.), *reh. denied*, 576 F. 2d 931 (5th Cir.), *cert. denied*, 439 U.S. 964, 99 S. Ct. 451, 58 L.Ed. 2d 422 (1978). A *pro se* § 2255 pleading was filed in 1979, alleging erroneous evidentiary rulings, double jeopardy, insufficiency of the evidence, and ineffective assistance of counsel. Relief was denied and no appeal was taken.

In 1983 Herrera filed the instant petition, again urging ineffective counsel and raising four new grounds. The district court invoked Rule 9 (b) and dismissed the petition without notice to Herrera and without receiving any evidence. We reversed and remanded, holding that Herrera should have been afforded an opportunity to explain his failure to raise all of his claims in the 1979 application. 738 F. 2d 435 (5th Cir. 1984).

On remand, Herrera filed an affidavit setting forth his response to the 9 (b) issue. He acknowledged his awareness in 1979 of the facts underlying these claims. No adequate explanation for the failure to raise them at that time was offered. Upon recommendation of the magistrate, the district court dismissed the § 2255 motion.

Herrera bears the burden of showing either that at the time of his 1979 motion he lacked knowledge of the facts underlying his instant claims or that he did not understand their legal significance. *Daniels v. Blackburn*, 763 F. 2d 705 (5th Cir. 1985); *Sockwell v. Maggio*, 709 F. 2d

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[1] Rule 9 (b) of the Rules Governing § 2255 Motions provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

341 (5th Cir. 1983).[2] As noted, his affidavit reflects an awareness in 1979 of the facts underlying the instant contentions and the legal significance of those facts. He was twice permitted to amend his 1979 pleadings but failed to raise the four claims now presented. His proffered excuses do not fall within the *Sockwell* exceptions to Rule 9 (b)

AFFIRMED.

[2] Rule 9 (b) of the Rules Governing § 2255 Proceedings is similar to Rule 9 (b) of the Rules Governing § 2254 Cases, and § 2254 Rule 9 (b) cases have precedential value in the consideration of § 2255 motions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIAZAR HERRERA-VINEGAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX

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INDEX TO SUPPLEMENTAL APPENDIX

PAGE

Supplemental Appendix I—
United States Magistrate's Memorandum and Recommendations 1

Supplemental Appendix II—
Order Entered March 14, 1985 5

Supplemental Appendix III—
Order Entered October 30, 1984 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIAZAR HERRERA-VINEGAS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Case No. DR-83-CA-34
(Criminal Action No. DR-77-CR-43)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELIAZAR HERRERA-VINEGAS,

Defendant.

UNITED STATES MAGISTRATE'S MEMORANDUM & RECOMMENDATION

The following findings and recommendations are submitted to the Court pursuant to Title 28, United States Code, § 636(b)(1)(B) and Rules 2(b)(1) and 3(a)(1) of the order of 1980 pertaining to the powers and duties of the United States Magistrate.

History of the Case

Petitioner, Eliazar HERRERA-Vinegas, on August 21, 1983, filed his motion to Vacate, Set Aside or Correct Sentence by a person in Federal Custody. He was convicted in Cause No. DR-77-CR-43, United States of America v. Eliazar HERRERA-Vinegas, and sentenced to 45 years

in prison and fined $100,000.00. The case was appealed and the Fifth Circuit affirmed it in an unpublished opinion. Among those grounds raised upon appeal were the insufficiency of evidence to support his conviction. Thereafter, Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence and other motions attacking the admission of hearsay testimony, admission of evidence obtained in an unlawful search, exposure to double jeopardy, insufficiency of evidence and ineffective assistance of counsel. The Court prepared a memorandum opinion overruling each of these points and filed it on January 25, 1982. A judgment of dismissal was filed with it. The record reflects that the Clerk mailed copies of the memorandum opinion and Judgment to Petitioner at his address in Kansas. No appeal was taken from this judgment.

Now, Petitioner has filed a subsequent Motion to Vacate, Set Aside or Correct Sentence in Cause No. DR-83-CR-34. Once again, he raises the issue of ineffective assistance of counsel and, the issue of lack of an interpreter and illegal sentence. This Court denied the petition because of abuse of the writ and petitioner appealed the order. The Fifth Circuit Court of Appeals reversed the order of this Court with the instructions that Petitioner had a right to present reasons why the alleged constitutional violations were not presented in his previous petitions.

An order was entered by this Court ordering Petitioner to show cause why this latest motion should not be dismissed under Rule 9(b) for abuse of the writ. Petitioner filed his response within the time period allowed.

Findings of Fact and Conclusions of Law

The response filed by Petitioner is without merit. Petitioner has not shown any reason why his repetitive claim of ineffective assistance of counsel deserves reconsideration. The issue of Petitioner's counsel was decided by this Court in an earlier proceeding and in doing so reviewed and relied upon files and records from Petitioner's case. Petitioner did not appeal that finding. Moreover, Peti-

tioner made no showing that the ends of Justice would be best served by reaching the merits of this subsequent petition.

Petitioner's explanation of his failure to raise the remaining grounds in his previous petition is also without merit.

He does not contend he was unaware of the facts supporting his newly asserted claims or that he was unaware that those facts constituted a basis for habeas relief. See *Jones v. Estelle*, 692 F2d 380, (5th Cir.) 1982. He contends that he has tried on previous occasions to bring them before the Court through his "jailhouse attorneys" but due to their lack of knowledge, inexperience and communication problems, it was not done. (See Tr.)

Petitioner was ordered by United States District Judge, D.W. Suttle in September 1980 to "put all his claims in one motion and that the Court Clerk supply Petitioner with a Section 2255 form petition." (Tr. 95) At least two amended motions were filed after the order of Judge Suttle in which he could have presented the above issues. Petitioner has not shown just cause for not doing so. See *Jones v. Estelle*, supra.

Recommendation

The Petitioner's motion to Vacate, Set Aside or Correct Sentence should be summarily dismissed without considering the merits of the allegations.

SIGNED AND ENTERED this 4th day of February, 1985.

DURWOOD EDWARDS
United States Magistrate

Certificate of Service

The Clerk shall serve a copy hereof upon all parties by mailing such copy to their attorneys of records, if any, and to the Petitioner. Any party may serve and file written objections to such findings and recommendations within ten (10) days after being served. See Title 28 United States Code § 636(b)(1)(C) and Rule 3(a)(1), local Rules, Powers and Duties of the United States Magistrate adopted by the Judges of the Western District of Texas.

_____

DURWOOD EDWARDS
United States Magistrate

SUPPLEMENTAL APPENDIX II

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CIVIL ACTION NO. DR-83-CA-34
(Crim. Action No. DR-77-CR-43)

ELIAZAR VINAGAS-HERRERA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

The matter before the Court is Petitioner's Motion to Vacate, Set Aside or Correct Sentence and the United States Magistrate's findings and recommendation, filed on February 4, 1985, concerning this motion. No objections to the Magistrate's findings and recommendation have been filed with the district court, therefore, a de novo review by this Court has been rendered unnecessary. *See* 28 U.S.C. § 636(b)(1)(C).

Accordingly, the Court hereby approves and adopts the Magistrate's Findings and Recommendation and it is ORDERED that the Motion to Vacate, Set Aside or Correct Sentence be dismissed with prejudice for writ abuse.

SIGNED and ENTERED this 14th day of March, 1985.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

SUPPLEMENTAL APPENDIX III

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CIVIL ACTION NO. DR-83-CA-34
(DR-77-CR-43)

ELIAZAR VINAGAS-HERRERA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

O R D E R

Explanation and Instructions—Read Carefully.

I.

Rule 9. Delayed or successive motions.

(a) *Delayed motions.* A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) *Successive motions.* A second successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

II.

Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under Rule 9(b) for the following reasons:

A review of the file indicates that you have previously filed an appeal and a 28 U.S.C. 2255 motion attacking your conviction in this case. In the appeal you raised the issues of insufficient evidence and denial of motions. This appeal was denied and the case affirmed by the Fifth Circuit on June 29, 1978. In your 2255 Motion you alleged illegally obtained evidence, entrapment, wrong venue, ineffective assistance of counsel, inadmissible evidence, illegal search and seizure and double jeopardy which was denied by the United States District Judge on January 20, 1982. No appeal was taken from this order.

In a successive motion you filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, in which you allege lack of effective assistance of counsel, lack of an interpreter and illegal sentence.

Your allegation of ineffective assistance of counsel was raised in your previous 2255 motion. Your allegations of lack of an interpreter and illegal sentence are being raised for the first time in this motion and could have been raised in your prior appeal or 2255 Motion. This successive motion may constitute an abuse of the procedure governed by these rules and may be inexcusable.

III.

This form has been sent so that you may explain why your motion contains the defects noted in (II) above. It is required that you fill out this form and send it back to the Court within 30 days. Failure to do so will result in the automatic dismissal of your motion.

IV.

When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is P.O. Box 1349, Del Rio, Texas 78841.

V.

This response must be legibly handwritten or typewritten, and signed by the movant, under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

VI.

Additional pages are not permitted except with respect to the facts which you rely upon in item 4 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

SIGNED AND ENTERED this 30th day of October, 1984.

DURWOOD EDWARDS
United States Magistrate

MOVANT'S RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?

YES XX NO_____

2. If you checked "yes" above, specify as precisely as you can the period of time during which you received assistance, up to and including the present.

1978—A fellow prisoner at the United States Penitentiary in Leavenworth, Kansas.
1979—A fellow prisoner at the United States Penitentiary in Leavenworth, Kansas.
1980—A fellow prisoner at the United States Penitentiary in Leavenworth Kansas.
1980—Ms. Cynthia Woelk, Law Student from the University of Kansas.
1983—A fellow prisoner at the United States Penitentiary in El Reno, Oklahoma.
1984—A fellow prisoner at the United States Penitentiary in Terre Haute, Indiana.

3. Describe the nature of the assistance, including the names of those who rendered it to you.

1978—Prisoner's name unknown. Preparation of 2255 motion.
1979—Prisoner's name unknown. Preparation of 2255 motion.
1980—Sylvester Jones—Prisoner. Preparation of 2255 motion.
1980—Cynthia Woelk—Law Student. Research on case.
1983—Don Sundberg—Prisoner. Preparation of 2255 motion and the subsequent appeal thereof.
1984—Phillip N. Croxton—Prisoner. The current preparation of this response pursuant to the Court order in the case.

4. If your motion is in jeopardy under Rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration.

If its fault under Rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

The Defendant was arrested on June 11, 1977. Defendant's counsel, Percy Foreman, saw the Defendant two times before trial. Mr. Foreman never asked the Defendant anything about the case. He only asked the Defendant about any monies the Defendant allegedly made from the drug business. Mr. Foreman did not try to investigate the case and, as the record reflects, did not put on any defense for the defendant at all. He rested the defense immediately after the Government rested its case-in-chief. The day before the trial started Mr. Foreman told the Court he was not ready for trial proceedings. The Government has stated that Mr. Foreman is one of the best and most respected criminal attorney's in Texas. However, the Defendant would aver that by a review of the records of the proceedings that Mr. Foreman's performance is well below adequate standards set for effective representation. Mr. Foreman stated that he was not ready for trial of this case and he is supposed to be one of the best attorneys in Texas. Of course Mr. Foreman was right, as the record reflects, he was not ready for trial. The Defendant is not wanting perfect counsel but one which would be a defense counsel in his case. All attorneys have their good days and their bad days and the Defendant feels that Mr. Foreman's representation of this case fell short of constitutional requirements. Mr. Foreman had the names and addresses of where he could have located witnesses requested by the Defendant to testify in his behalf and their testimony was relevant to the Defendant's defense. Mr. Foreman did not call witnesses in support of any defense. Mr. Foreman waited until the last minute and asked the court for a continuance in the proceedings so he could travel to Chicago to interview witnesses. The Court denied this enlargement of time. This would substantiate the Defendant's position that Mr. Foreman did

not investigate the case because the interview of witnesses is the basic rudiments of preparation for defense of a case. Mr. Foreman did not object to certain factual legal questions at trial that he objects to in other similar cases. The issue was brought to the trial court on a failure to provide an interpreter. One shocking fact present is that an attorney of Mr. Foreman's status would only visit the Defendant once before trial with an interpreter and at that meeting ask the Defendant a few questions about monies from the alleged drug trafficing and nothing dealing with the defense of the case. Considering the seriousness of the charges against the Defendant, the Sixth Amendment mandates that an attorney must investigate a case and represent a defendant in a diligent manner. As the record reflects, Mr. Foreman stated that he had trouble communicating with the Defendant. The Defendant did not understand the proceedings against him and still does not. He could not communicate with his counsel before or during trial. The trial court questioned Mr. Foreman on this issue and Mr. Foreman stated he could not produce an interpreter and was tardy on this issue.

The Defendant sincerely feels that there are constitutional questions present in this instant case that would override any abuse of writ under Rule 9(b). The Defendant has tried on previous occasions to bring these specific issues before the Court. The Defendant has been assisted by jailhouse attorneys that has hindered this case because of their lack of knowledge, inexperience and communication problems they had with the issues the Defendant tried to communicate to them. Now due to the problem with not having the money to hire an attorney coupled with the problem with jailhouse lawyers, the case is subject to dismissal under Rule 9(b). The Defendant has not intentionally withheld any ground from this Court. The Defendant feels that, pursuant to current case law and legislative mandates, there are issues of merit present for this Courts consideration and his case should not be dismissed for abuse of the writ pursuant to Rule 9(b). The Defendant further feels the Court would see this merit by a brief review of the allegations and facts contained herein.

Therefore, the Defendant would respectfully request this Honorable Court to grant relief in his favor and such other relief the Court would deem just and proper in its premises.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on this 16th day of November, 1984.

ELIAZAR VINAGAS-HERRERA, Movant

CERTIFICATE OF SERVICE

The clerk of the court is hereby ordered to serve a certified copy of this Order and Movant's Response on the Movant by certified mail, return receipt requested.

DURWOOD EDWARDS
United States Magistrate

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1278

In the Supreme Court of the United States

OCTOBER TERM, 1985

ELIAZAR HERRERA-VINEGAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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11pp

QUESTION PRESENTED

Whether the district court correctly exercised its discretion to dismiss petitioner's second motion to vacate his conviction pursuant to 28 U.S.C. 2255.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Daniels v. *Blackburn*, 763 F.2d 705 4

Jones v. *Estelle*, 722 F.2d 159, cert. denied, 466 U.S. 976 5

Miller v. *Bordenkircher*, 764 F.2d 245 4

Price v. *Johnston*, 334 U.S. 266 4

Sanders v. *United States*, 373 U.S. 1 5

United States v. *Herrera-Vinegas*, 573 F.2d 1308, cert. denied, 439 U.S. 964 2

Statutes and rule:

18 U.S.C. 2 2

21 U.S.C. 841(a)(1) 2

21 U.S.C. 846 2

21 U.S.C. 952(a) 1

21 U.S.C. 960(a)(1) 1-2

21 U.S.C. 963 1

28 U.S.C. 2254 4

Page

Statutes and rule:

28 U.S.C. 2255 ..... 2, 3, 4, 5

Rule 9(b), Rules Governing Section 2255 Proceedings 4

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1985, and the petition for a writ of certiorari was filed on January 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted in 1977 of conspiring to import heroin, in violation of 21 U.S.C. 963; aiding and abetting the illegal importation of a controlled substance, in violation of 21 U.S.C. 952(a),

960(a)(1) and 18 U.S.C. 2; conspiring to possess and distribute a controlled substance, in violation of 21 U.S.C. 846; and aiding and abetting the possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to a total of 45 years in prison and fined $100,000.

1. The evidence supporting petitioner's convictions is discussed in our brief in opposition to the petition for a writ of certiorari seeking direct review of petitioner's convictions. See 78-290 Br. in Opp. 2-3. Briefly, the evidence showed that Drug Enforcement Administration agents apprehended Alfredo Alamo-Ramirez as he attempted to bring 23 pounds of heroin into Texas from Mexico. Alamo-Ramirez told the agents that he had been instructed to telephone a man known as "Charro" when he reached Chicago and then to deliver the heroin to "Charro." Alamo-Ramirez agreed to accompany the agents to Chicago and call "Charro". Petitioner answered the telephone, identified himself as "Charro," and arranged for delivery of the heroin.

The court of appeals affirmed petitioner's convictions. Petitioner then filed a petition for a writ of certiorari in which he raised for the first time his claim that he was denied a fair trial because he was not provided with an interpreter; this Court denied certiorari. *United States* v. *Herrera-Vinegas*, 573 F.2d 1308 (5th Cir.) (Table), cert. denied, 439 U.S. 964 (1978).

Approximately one year later, petitioner filed a motion to set aside his convictions pursuant to 28 U.S.C. 2255. He claimed that hearsay testimony and evidence obtained as the result of an unlawful search were improperly admitted at the trial, the trial violated his constitutional protection against double jeopardy, the evidence was insufficient to support his convictions, and he received ineffective assistance of counsel at his trial. The motion did not raise any

claim relating to the absence of an interpreter at the trial. The district court dismissed the Section 2255 motion, and petitioner did not appeal. Pet. App. 2.

2. On August 12, 1983, petitioner filed a second motion to vacate his convictions pursuant to 28 U.S.C. 2255. Petitioner again asserted a claim of ineffective assistance of counsel; he also contended that his convictions were improper because he had not received an interpreter at trial and had not been afforded an opportunity to secure witnesses in his own behalf. In addition, petitioner contended that his sentence was illegal. The district court denied the motion and dismissed the case on the ground that petitioner had not presented any excuse for his failure to include these claims in his first Section 2255 motion. Pet. App. 2.

The court of appeals reversed. 738 F.2d 435 (1984) (Table). It found that the district court had not afforded petitioner an adequate opportunity to explain his failure to raise all of his claims in his first Section 2255 motion, and it remanded the case for consideration of any explanation tendered by petitioner. Pet. App. 2.

3. On remand, the district court referred the case to a magistrate and directed the magistrate to provide petitioner with a form offering petitioner the opportunity to explain why his new claims had been omitted from his first Section 2255 motion. Petitioner filed an explanation with the magistrate, and the magistrate considered the explanation and recommended that the district court summarily dismiss the motion without holding an evidentiary hearing. He stated that "[p]etitioner's explanation of his failure to raise [his new claim] in his previous [motion] is * * * without merit," observing that petitioner "[did] not contend he was unaware of the facts supporting his newly asserted claims or that he was unaware that those facts constituted a basis for

habeas relief" (R.E. 13). The district court adopted the magistrate's recommendation and dismissed petitioner's motion to vacate his convictions (Pet. App. 2).

The court of appeals unanimously affirmed (Pet. App. 1-3). It held that petitioner had failed to meet his burden of showing that he either "lacked knowledge of the facts underlying his instant claims or that he did not understand their legal significance" at the time he filed his first Section 2255 motion (Pet. App. 2). Since petitioner's affidavit "reflect[ed] an awareness in 1979 of the facts underlying the instant contentions and the legal significance of those facts," the court concluded that the district court correctly dismissed petitioner's motion to vacate his convictions (*id.* at 3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-bound claim is not warranted.

Rule 9(b) of the Rules Governing Section 2255 Proceedings states in pertinent part that "[a] second or successive motion [alleging new or different grounds for relief] may be dismissed if * * * the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." When a movant raises a new ground for relief in a successive motion, he bears the burden of demonstrating either that he lacked knowledge of the facts underlying his new claim or that he did not understand the legal significance of the relevant facts. *Price* v. *Johnston*, 334 U.S. 266, 291-292 (1948); *Miller* v. *Bordenkircher*, 764 F.2d 245, 250-251 (4th Cir. 1985) (interpreting identical rule relating to actions under 28 U.S.C. 2254); *Daniels* v. *Blackburn*, 763 F.2d 705 (5th Cir. 1985) (same); *Jones* v. *Estelle*, 722 F.2d 159, 164

(5th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1984) (same). The decision whether to deny a Section 2255 motion on the ground that the claim for relief was omitted from a prior motion rests within the sound discretion of the trial judge. See *Sanders* v. *United States*, 373 U.S. 1, 18 (1963).

The courts below correctly determined that petitioner was aware when he filed his first Section 2255 motion of the factual background and legal significance of his claim relating to the absence of an interpreter at the trial. Petitioner admitted his knowledge of these facts in the affidavit filed in the district court (Pet. App. 3). Indeed, petitioner hardly could deny knowledge of the claim since the issue had been raised in the petition for a writ of certiorari that he filed in 1978—one year before he filed his first Section 2255 motion. Petitioner claims (Pet. 10-11) that his failure to raise this issue in his first Section 2255 motion should be excused because he received poor legal advice from fellow inmates and because he has a limited ability to communicate in English. But it would have taken little linguistic ability or legal acumen simply to incorporate the argument from his petition for a writ of certiorari into the Section 2255 motion filed in 1979.

Moreover, as we noted in our first brief in opposition (78-290 Br. in Opp. 3-4), there is no reason to believe that petitioner was prejudiced because an interpreter was not present at his trial. Petitioner characterized himself as a "long-time" resident of Chicago and was able to understand and answer questions posed to him at arraignment without apparent difficulty. Petitioner's attorney did state during the sentencing proceeding that he had difficulty communicating with petitioner, but the attorney's remark may have reflected a concern about petitioner's ability to express himself fluently during the sentencing proceeding and thus

does not by itself show that petitioner was unable to understand the events at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

MARCH 1986